REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CRIMINAL APPEAL NO. 13 OF 2011

(Appeal from the Judgment of the SRM'S Court Bondo in CR. CASE NO. 1108 OF 2010)

JACOB ODHIAMBO OTIENO :: APPELLANT

-VERSUS-

REPUBLIC :: RESPONDENT

JUDGMENT

This is an appeal preferred from the judgment of the SRM's Court in Bondo, Case No. 1108 of 2010. The appellant **JACOB ODHIAMBO OTIENO** had been charged with the offence of attempted defilement contrary to Section 9(2) of the Sexual Offences Act No. 3 of 2006. He was also faced with an alternative count of Indecent assault with a child contrary to Section 11(1) of the said Act. The appellant pleaded not guilty, he was tried and found guilty of the alternative count convicted and sentenced to 10 years imprisonment.

The particulars of the alternative offence were that on the 31st day of May, 2010 at Oyamo Island in Bondo District within Nyanza Province the appellant committed an Indecent Act with **I.A.H. ,** a girl aged 12 years by touching her breast and vagina.

Being aggrieved with the judgment of the trial court the appellant preferred this appeal on the following grounds:-

1. That his Constitutional rights were violated when he was retained in police cells for more than the required period of time (4 days) without congruent reasons before being arraigned to court.

2. The complainant raised the complain on 31st of May yet no report was made to the police when the incident took place.

3. That PW1 and PW3 all alleged before court that the appellant touched the complainant's private parts yet no sufficient proof was given was based on hearsay.

4. PW4 (investigation officer) applied probability method in ascertaining that actually the offence took place, since he carried out a short and shoddy investigation.

5. That the learned trial magistrate erred in law and facts by relying on uncorroborated evidence to convict.

At the hearing of this appeal the appellant relied on his written submissions that may be summarized as follows; the evidence of PW1 was not corroborated yet in her evidence PW1's stated that her screams attracted people, evidence of an independent witness was crucial, investigation by the police was poor, the evidence on record cannot sustain the charge and that the evidence on record is contradictory.

On its part the prosecution through learned State Counsel **Mr. P. Kiprop** opposed the appeal on the grounds that the appellant attempted to defile the complainant, there was no mistaken identity as the appellant was known to the complainant and the incident happened at day time, further the allegation of violation of Constitutional right of the appellant can be canvassed through a petition for now it is an un proven allegation. He urged for dismissal of the appeal.

This is the first appellate court. It is charged with the duty of re-considering the evidence on record, examine and analyze the same afresh and to come up with an independent opinion bearing in mind that the trial court had the benefit of seeing and hearing the witnesses. See **OKENO VS R (1972) E. A.** at page 32.

The brief facts of the prosecution case is that on the 31st of March, 2010 at about 5 pm as the complainant (**PW1)** was on her way to the lake from the Centre, she met the appellant who blocked her way, touched her buttocks, breasts and vagina using his hands, causing the complainant to drop her sibling whom she was carrying on her back.

The prosecution has the duty of proving the charge beyond reasonable doubt. The trial court found that the first count of attempted defilement was not proved. It found the appellant guilty of the alternative count.

In considering the evidence on record this court considered evidence adduce by the witnesses as follows.

PW1 I.A. aged 12 years stated:-

- On 31.5.2010 at around 5 pm she met the appellant.
- She was on her way to the lake to pick money from her mother a fish monger.
- She met the appellant near a maize plantation.
- He held her, touched her buttocks, breasts and vagina with his hands.
- He blocked her, as he was touching her the child on her back fell.
- She screamed and ran away leaving the child behind.
- She reached her mother and informed her of the incident, they went back for the child.
- They reported the matter to the chief.

PW2J.A.J. .

- A mother to PW1.
- A fish monger, was at the beach on 31/5/2010.
- Appellant was also at the beach.
- He left and within minutes she heard screams.
- She saw her daughter emerge from the maize plantation.
- **PW1** told her that the appellant had held her, touched her buttocks, breast and private part.
- She accompanied **PW1** to pick the child who was dropped.
- The appellant resurfaced. She questioned him and he told her that whatever happened was between him and PW1.
- She reported the matter.
- The appellant was arrested after sometime by the chief.
- On Cross – Examination she stated that the police were informed of the incident on 7.6.2010.

PW3 – AP. Sgt. David stationed at Nyangoma D. O's Office stated.

- On 23.6.2010 he was at the Nyangoma Police Camp as the 2nd in-charge.
- He was approached by the Assistant Chief of Oyamo Ndeda Island who had a warrant of arrest.
- On 24.6.2010 he travelled to Oyamo Island.
- He was assisted by the Assistant Chief to arrest the appellant.

PW4 – P.C JOHANA LENGANDU of Bondo Police Station conducted investigations. He stated:-

- That on 31/5/2010 while on duty he received a report from A, that the appellant touched his daughter's private parts while she was on her way to the lake to see her mother.
- He booked the report and escorted the girl for examination at Bondo hospital.
- He issued a warrant of arrest for the appellant's arrest.

The appellant was put on his defence. He gave an unsworn statement as follows:-

- He is a fisherman.
- On 23.6.2010 he received a report requesting him to see his employer.
- He went to the beach at 10.30.
- He was then arrested.

- He does not know anything about the offence.

This is a case where there was no independent witness. The court has to consider the uncorroborated evidence of a minor aged 12 against the denial by the accused person. The onus of proving the case against the accused person lies upon the prosecution as earlier stated. The question here is whether or not based on the evidence on record it will be safe to convict the appellant.

The trial magistrate grappled with the question. He posed the question as follows:-

"Is PW1 telling the truth? Can the court rely on the evidence of the minor whose evidence is not corroborated? What is the danger of relying on her uncorroborated evidence?"

The trial court answered the above questions thus;

"The evidence of PW1 though uncorroborated struck me as truthful. When asked what she did when accused held her, she said that she screamed but nobody went for her rescue. This was confirmed by PW2 ----"

The court further made the following observation;-

"The minor appeared consistent both in chief and in cross – examination. She struck me as an honest and truthful witness despite her age. I have no reason to doubt her."

On my part I note that the trial court did not satisfy itself that the minor aged 12 understood the oath administered on her. However she was sharp and gave a clear account of the incident. I am satisfied that she understood and appreciated the oath. I have like the trial court warned myself of the danger of relying on the evidence of a single witness. I take note of the fact that the victim **PW1** and the appellant were known to each other. The alleged incident was at about 5 pm and I therefore rule out mistaken identity. Secondly I also do find that the complainant PW1 was clear and consistent in her evidence. She struck the trial court as a truthful witness. I have no reason to doubt the of the trial court. In **Abdalla bin Wendoh & another V R** E.A.C.A at p. 163 the Court stated:-

"Subject to certain well known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness respecting identification, especially when it is known that the condition favouring a correct identification were difficult. In such circumstances what is needed is other evidence, whether it be circumstantial or direct, pointing to guilt, from which a judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from the possibility of era."

Although there may have been no corroboration, I have considered the disappearance of the appellant who could not be arrested immediately to be inconsistent with the conduct of an innocent person. In **Malowa V R** 1980 KLR the Court of Appeal declined to interfere with the decision of the trial court and concurred with it that the conduct of the appellant in disappearing immediately after the incident he was accused of and appearing after 6 months corroborated the prosecution evidence.

In this case the incident occurred on 31st May, 2011. The appellant disappeared and was arrested on 23rd June, 2010. A span of about 3 weeks. This conduct in my view corroborates the evidence of **PW1**.

Due to the above, I see no reason therefore to interfere with the finding of guilt by the trial court and the subsequent conviction.
The law provides for a minimum sentence of not less than 10 years for the offence the appellant was convicted off.

The sentence is therefore lawful. Appeal is dismissed.

DATED AND DELIVERED THIS 23RD DAY OF SEPTEMBER, 2011.

ALI-ARONI
JUDGE

In the presence of:

……..…… for State

…….…….. Appellant present in person.